APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

SESHAPPAYA (PLAINTIFF), APPELLANT,

v.

VENKATRAMANA UPADYA AND ANOTHER (DEFENDANTS Nos. 1 AND 3), RESPONDENTS.*

1908. November 17, 18. December 8. 1909. July 20. 1910. January 5.

Civil Procedure Code, Act XIV of 1882, s. 13—"Person claiming under", who is—Test to determine interest represented—Landlord does not represent interest of mulgeni tenant—Estoppel—No estoppel where party not misled.

The mulgeni tenure is a permanent heritable tenure and mulgeni interest is not an interest subordinate to that of the lessor.

In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter within the meaning of section 13 of the Civil Procedure Code it must be shown that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his. A decision against him will bind interests acquired from him subsequently and all subordinate interests represented by him whensoever acquired.

A mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor.

To estop a party, it must be shown that his acts or representations misled the party setting up the estoppel.

SECOND APPEAL against the decree of P. J. Itteyerah, Subordinate Judge of South Canara, in Appeal Suit No. 123 of 1905, presented against the decree of V. B. Ramaswami Aiyar, District Munsif of Kundapur, in Original Suit No. 458 of 1904.

The facts are thus stated in the judgment of the lower Appellate Court.

"The property originally belonged to Shesha Navada. In execution of a decree obtained by plaintiff against him, it was attached and sold by the Court when it was purchased by plaintiff on 30th May 1903 (exhibit C). The property was delivered to him on 12th March 1904 (exhibit D).

The first defendant claims under a mulgeni grant made by Ganapaya Urala who claimed to have purchased the property from Shesha Navada under exhibit XIX on 3rd May 1892. When plaintiff attached the property as Shesha Navada's, Ganapaya

* Second Appeal No. 386 of 1906.

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Urala intervened with a claim petition but his claim was rejected, and a subsequent suit instituted by him to establish it was dismissed by the Original and Appellate Courts (exhibits E and B).

It is, therefore, contended by plaintiff that the first point is *res judicata* as between plaintiff and first defendant. No doubt first defendant derived his title from Ganapaya Urala, but he obtained it before the previous suit had been instituted against him. In 8 Allahabad, 324, it was held that a person who obtained title from another before the suit was instituted against him is not a person claiming under him, and that section 13 of the Code of Civil Procedure must be interpreted as if, after the words "under whom they or any of them claim" the words "by a title arising subsequently to the commencement of the former suit" had been inserted. To hold otherwise would be opening a wide door to fraud. I agree with the District Munsif in finding that the matter is not *res judicata*.

The sale by Shesha Navada to Ganapaya Urala is said to have been granted collusively and without consideration to defraud his creditors. Ganapaya Urala was Shesha Navada's brother-in-law, but there is no evidence to show that the latter had any creditors except plaintiff and those mentioned in exhibit XIX whom Ganapaya Urala was to pay off."

The plaintiff's suit was dismissed and the judgment was confirmed on appeal. Plaintiff appealed.

K. Bashyam Ayyangar for *K. P. Madhava Rao* for appellant.

B. Sitarama Rao for first respondent.

JUDGMENT.—In Original Suit No. 77 of 1900 on the file of the District Munsif of Kundapur, Ganapaya Urala having been defeated on a claim petition arising out of an attachment made by the present plaintiff, sued the present plaintiff to establish title to the property attached. The suit was dismissed on a finding that the conveyance on which he founded his title, a sale by the owner Shesha Navada, was fraudulent and not intended to convey any interest. The decision was affirmed on appeal.

The plaintiff now sues alleging that after the dismissal of Ganapaya Urala's suit, he brought the attached property to sale and purchased it himself and obtained possession ; but was dispossessed by the first defendant, who set up a mulgeni tenure under Ganapaya Urala. His suit is therefore for recovery of the land, and it has been dismissed on the ground that the first defendant is entitled to

possession as mulgenidar. It is found *inter alia* that the first defendant has remained in possession ever since the mulgeni tenure was created, and that the plaintiff's allegation that he obtained actual possession is not true.

The first question for decision in the Second Appeal is whether the first defendant is bound by the decision in the suit of 1900, in which it was held that Ganapaya Urala had no title. If he is so bound, the plaintiff's title cannot be questioned in this suit, and apart from any question of dispossession the plaintiff will be entitled to succeed on his title.

The question is whether the first defendant is a person who claims under Ganapaya Urala within the meaning of section 13 of the Code of Civil Procedure.

The ground of privity is stated by the learned author of Bigelow on Estoppel to be property and not personal relation (page 142, 5th edition), and this view is accepted by Mahmood J. in *Sita Ram* v. *Amir Begam*(1). The successor to or purchaser from a party becomes a privy only in respect of the interests and rights in property to which he has succeeded or which he has purchased.

And it is not to be supposed that the Civil Procedure Code contemplates the adjudication, between the parties to a suit, of interests or other rights, which are not theirs, and are not represented by them. Consequently though the words 'under whom they or any of them claim' in section 13 of the Code of Civil Procedure are wide, there seems to be no difficulty in the way of restricting them so as to bind the party to the subsequent suit by the decision in the former suit only in respect of interests represented by the party to the former suit at the time of the suit. Other interests with which he had parted before the suit and which he had ceased to represent could not properly be the subject of adjudication in the suit.

In an Irish case (*In re De Burgho's Estate*)(2), Madden J. lays down and explains the rule as follows:—" According to the clear principles of the law of Estoppel it is necessary in order to estop the objector, to show that he derived title by act or operation of law subsequent to the recovery of the judgment. If this is shown, it is reasonable that he should be estopped because his

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(1) (1886) I.L.R., 8 All., 324 at p. 337. (2) (1896) 1 Ir. R., 274.

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estate was represented at the time of the recovery of the judgment though not in his person."

The question then in each case is whether the interest in suit was represented in the former suit, by the party under whom the claimant holds in the second suit, and we apprehend that if it was so represented it does not matter whether it vested in the privy before or after the former suit. In *Soshi Bhusun Guha* v. *Gogan Chunder Shaha*(1), the learned Judges explain the law that a decision against a Hindu widow will conclude her husband's heirs on the ground that the widow represents the whole estate: and the same view is expressed by Mahmood J. in *Sita Ram* v. *Amir Begam*(2); and the ground on which this question was decided in favour of the mortgagee in those two cases as well as in *Bonomalee Nag* v. *Koylash Chunder Dey*(3), is that the mortgagor after the mortgage cannot represent the estate vested in the mortgagee. The test is whether the interest is represented and if it be possible that the party represents in the suit an interest already vested in some one else, that person will be a privy. Though the rule is stated in Bigelow on Estoppel (5th edition, page 142) with reference to the time at which the interest becomes that of the successor of or purchaser from the party, it is recognised by the learned author that there may be cases to which this consideration will not apply, and these he includes in what he calls 'holding subordinately.' "To make a man privy to an action he must have acquired an interest in the subject matter of the action either by inheritance or succession or purchase from a party subsequently to the action, or he must hold property subordinately" and as an instance of a subordinate holding he takes the case of landlord and tenant; "a lawful judgment," he says "which deprives the landlord of the estate, deprives the tenant, of necessity, of his subordinate right" (page 143).

Thus the view of the learned author would seem to be that the landlord necessarily represents the interest of the tenant in an action so far as that interest is subordinate.

We do not know of any English or Indian authority in support of this view; the rule that the interest, to be bound, must be

(1) (1895) I.L.R., 22 Calc., 364 at p. 372.

(2) (1886) I.L.R., 8 All, 324 at p. 337. (3) (1879) I.L.R., 4 Cal., 692.

acquired after the action, is supported by the English cases of *Doe dem Thomas Foster* v. *The Earl of Derby*(1), and *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company*(2), and many American cases are cited in support of it in the work we have quoted. In Hukm Chand on *res judicata* we find cited an American case in which it was held that a tenant of a defendant in ejectment who had acquired his lease before the commencement of the suit is not estopped as to his term by judgment in the suit against his lessor (page 185). This seems to take a view contrary to that of Dr. Bigelow but the case is not cited in the 5th edition of his work nor have we been able to obtain the report of it.

Neither of the English cases to which we have referred relates to landlord and tenant, but in the Irish case the title of the objector who was held not to be estopped was derived from a lease for lives renewable for ever. This may however be distinguishable from the case of ordinary tenancies from year to year or for years. In the present case it is not necessary for us to decide on the soundness of the view that a tenant may be represented by his landlord in so far as his holding is subordinate. It is contended that the mulgeni holder must be treated as a tenant, and be bound as such, but the mulgeni tenure is a permanent heritable tenure, alienable in some cases by the conditions of the mulgeni chit, but in all cases perpetual though subject to forfeiture in certain circumstances. The instrument in the present case is not before us but it is not suggested that it creates anything less than an ordinary mulgeni interest.

The lessor has when the interest is inalienable a reversion or a 'possibility of reverter' and a right to an annual rent, but he cannot determine the tenancy by notice nor will it be terminated by efflux of time. Consequently it cannot in our opinion be properly said that the mulgeni is an interest subordinate to that of the lessor. It is certainly greater than that of a simple mortgagee who has not the possession and who can be redeemed at any time, after the mortgage money is due and yet if *Sita Ram* v. *Amir Begam*(3) is right, the simple mortgagee is not estopped by a decision against the mortgagor in a suit instituted after the mortgage.

(1) (1834) 1 A. & E., 783 at p. 785. (2) (1894) L.R., 1 Ch., 578 at p. 595.
(3) (1886) I.L.R., 8 All., 324.

It seems to us that the lessor having alienated in perpetuity his right to possession, and having reserved to himself only a right to receive a rent cannot be said to have represented the interest of the mulgenidar in the suit between himself and the plaintiff.

It follows that the lower Courts were right in holding that the defence is not barred. It is then contended that the defendant is estopped in a different way. In the former suit he was a witness for Ganapaya Urala and he did not then or before the execution sale bring his mulgeni interest into Court. This conduct, if it is to create an estoppel, must be found to have misled the plaintiff. He must show that he purchased the property in the belief that the defendant had abandoned his right to defend his mulgeni tenure, for there is no doubt that he knew during the progress of the former suit that the mulgeni was set up. The instrument was filed in the suit (judgment exhibit E). There is no issue on this question but no doubt if it were shown that Ganapaya Urala in his suit was suing on behalf of the defendant—that the defendant was then the real plaintiff—the defendant might be bound, but we do not find that alleged anywhere.

We think this contention fails. Nor can the defendant rely on section 41 of the Transfer of Property Act: that question also was not raised by the defendant before the District Munsif and as Shesha Navada remained in possession until turned out by the 1st defendant himself, this section cannot be said to be applicable.

The remaining question is a question of fact. Had Ganapaya Urala any title to the land on which he gave the mulgeni? The District Munsif finds that he had, and if paragraph 5 of the Subordinate Judge's judgment can be read as a finding on this question, he must be taken to be of the same opinion. It does not however follow from the fact that Shesha Navada was not pressed by creditors, that he intended to sell all his property to his brother-in-law for Rs. 1,000. In the former suit there seems to have been evidence that the conveyance was put in Ganapaya's name to deter others from lending and that this was done at the instance of Shesha Navada's family. That evidence is not evidence in this case, but we mention it to show that the object of a sham conveyance is not necessarily confined to the provision of a shield against present creditors.

We cannot therefore accept paragraph 5 of the Subordinate Judge's judgment as a finding that Ganapaya had title in June

1899, and we must call upon the District Judge of South Canara for a finding on the first of the issues settled by the District Munsif in the light of the above observations.

The finding should be submitted in six weeks and seven days will be allowed for filing objections.

[The District Judge found the mulgeni a real transaction and the appeal was dismissed.]

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

SRINIVASA AIYANGAR (PETITIONER), RESPONDENT,

v.

KANTHIMATHI AMMAL (RESPONDENT), RESPONDENT.*

1910. January 17, 18.

Civil Procedure Code, Act XIV of 1882, s. 295—Rateable distribution under several decrees : "Same judgment-debtor"—Decree against judgment-debtor ; Subsequent decree against his legal representatives to be satisfied out of his estate.

A obtained a decree against one Maruthamuthu Pillai; subsequently, *B* obtained a decree against the legal representatives of Maruthamuthu Pillai and his estate in their hands. *B* applied under section 295, Civil Procedure Code, to share rateably in the proceeds of property sold in execution of *A*'s decree :

Held, that *B* was not entitled to do so. *Govind Abaji Jakhadi* v. *Mahoniraj Vinayak Jakhadi*, [(1901) I.L.R., 25 Bom., 494], followed.

When a decree is obtained against the legal representatives of a deceased person, they are the judgment-debtors. *Kaliappan Servaikaran* v. *Varadarajulu* [(1909) 19 M.L.J., 651], referred to.

PETITION under section 622 of the Code of Civil Procedure of 1882, praying the High Court to revise the order of N. Sundara Aiyar, District Munsif of Tiruvadi, in Execution Application No. 454 of 1907 in Original Suit No. 479 of 1898.

The respondent obtained a decree in Original Suit No. 479 of 1898 against one Maruthamuthu Pillai and, in execution, attached a house. He obtained leave under section 294, Civil Procedure Code, to bid at the sale of the house and set off the purchase money against the decree amount, and purchased the property on 27th

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* Civil Revision Petition No. 563 of 1907.